



VOSH PROGRAM DIRECTIVE: 09-003D

ISSUED: April 1, 2003

SUBJECT: Administrative Regulations Manual (ARM) for the Virginia Occupational Safety and Health Program

A. Purpose.

This directive transmits to field personnel the above-referenced Administrative Regulations Manual (**CHANGE I**). In **CHANGE II**, amendments are made to the ARM to correct a typographical error and to reflect revised statutory language concerning the time limit for employers to report work-related incidents resulting in a fatality or in the in-patient hospitalization of at least 3 individuals. **CHANGE III** reflects the requirements from the Abatement Verification regulation that employers provide specific documentation of abatement, including detailed evidence of the corrective actions that have been taken to abate hazards for which citations were issued. **CHANGE IV** removes outdated references to the Administrative Process Act (APA) which appear in the Administrative Regulations Manual and replaces those outdated references with renumbered references reflecting the statutory revisions to the APA.

This Program Directive is an internal guideline, not a statutory or regulatory rule, and is intended to provide instructions to VOSH personnel regarding internal operation of the Virginia Occupational Safety and Health Program and is solely for the benefit of the program. This document is not subject to the Virginia Register Act or the Administrative Process Act; it does not have general application and is not being enforced as having the force of law.

B. Scope.

This directive applies to all VOSH personnel.

C. References.

CHANGE II: Not Applicable.

CHANGE III: 62 FR 15324 (March 31, 1997); OSHA Instruction STP 2.23 (June 4, 1997).

CHANGE IV: Not Applicable.

D. Cancellation.

VOSH Program Directive 09-003C (March 15, 1998).

E. Action.

Directors and Managers shall assure that VOSH personnel are aware of and comply with the rules, requirements and procedures of the ARM for the VOSH Program, as amended.

F. Effective Dates.

CHANGE I: June 30, 1994.
CHANGE II: August 1, 1995.
CHANGE III: December 15, 1997.
CHANGE IV: March 1, 2003.

G. Expiration Date.

Not Applicable.

H. Background.

CHANGE I: The purpose of the Administrative Regulations Manual (ARM) is to provide an operational framework of rules and procedures for the administration of the Virginia Occupational Safety and Health (VOSH) program.

The major objective of this revised ARM was to provide employers, employees, the public, VOSH employees, and other parties interested in the administrative rules governing the VOSH program with a simplified document in a more concise format to aid in the understanding of the general administrative provisions and specific related procedures of the program.

The Safety and Health Codes Board adopted this revised Administrative Regulation for the VOSH Program at its meeting on April 25, 1994. This regulation became effective on June 30, 1994.

CHANGE II: Two amendments were made in the document. The purpose of the first amendment, which appears in paragraph 4 of what was then § 2.3, is to delete a typographical error that inadvertently resulted during the 1994 revision.

The second amendment, affecting what was then § 2.4. A. and B., was made pursuant to Chapter 373 of the 1995 Virginia Acts of Assembly which amends Chapter 40.1-51.1, dealing with duties of employers. This statutory change was initiated by the Department to comply with a similar regulatory change by federal OSHA published at 59 FR 15594 on April 1, 1994.

The Safety and Health Codes Board adopted this revised Administrative Regulation for the VOSH Program at its meeting on April 17, 1995. This regulation became effective on August 1, 1995.

CHANGE III: Historically, employer compliance with requests by both federal OSHA nationally and VOSH to provide evidence of abatement has been administrative, rather than regulatory in nature and follow-up inspections were often necessary to determine whether abatement had occurred.

A 1991 General Accounting Office (GAO) Report to Congress assessed the adequacy of federal OSHA's policies and procedures for ensuring abatement of cited hazards. In its report, GAO determined that OSHA's existing policies had limitations that interfered with OSHA's ability to identify those employers who have failed to abate the hazards for which they had been cited. This was especially true for construction employers who could move cited hazardous equipment to another location where it could continue to pose a risk to an additional group of employees who would not be

aware of the OSHA citation.

At its September 29, 1997 meeting, the Safety and Health Codes Board adopted revisions to the ARM which became effective on December 15, 1997.

CHANGE IV: Chapter 844 of the 2001 session of the General Assembly amended the Code of Virginia by recodifying Titles 2.1 and 9. As a result of this action, which became effective on October 1, 2001, the code sections in the Administrative Process Act were renumbered.

On December 2, 2002, the Safety and Health Codes Board adopted this revision of the ARM, with an effective date of March 1, 2003.

I. Summary.

CHANGE I: This was the first complete clean-up and revision of the Administrative Regulations Manual (ARM) which was initially adopted in 1986. This revision contained substantive changes primarily in the areas of additional definition of terms and clarification of the 48-hour accident reporting requirements of employers. To respond to the requests to the Department for information by subpoena, new language was added which allowed the Commissioner to restrict VOSH employees from being deposed, testifying or otherwise participating in third-party lawsuits in which the Department had no genuine interest. This revision also clarified the VOSH program's response to certain federal judicial action, such as vacation of §1910.1000 permissible exposure limits (PEL). The revised ARM codified the employee misconduct defense and provided that the defense does not apply to supervisory personnel.

This revision also simplified the regulation by omitting requirements already stipulated in Title 40.1 of the Code of Virginia in those cases where no further regulatory language was necessary to carry out that mandate.

CHANGE II: This first amendment involves removing the unnecessary language, "subsection B of," which appears in paragraph 4 of § 2.3., Notification and Posting Requirements. This typographical error was made when the Administrative Regulation for the Virginia Occupational Safety and Health Program was revised in 1994.

The second amendment, which appears in § 2.4. A. and B., reduces from 48 hours to 8 hours the time limit for employers to report any work-related incident resulting in a fatality or in the hospitalization of at least 3, rather than 5, individuals. In cases where an employer does not immediately learn of a reportable incident, the employer would report within 8 hours, rather than 48 hours, of learning of such incident. This amendment also requires an employer to report within 8 hours, rather than 48 hours, after learning of the death of a worker who dies within 30 days of an incident; and provides specifics for information requirements and reporting methods.

CHANGE III: If abatement occurs during or immediately after the inspection that identified the violation(s), the employer would not be required to submit an abatement certification letter to VOSH. If the violation(s) is an other-than-serious violation, or serious violation that does not require additional documentation, the employer is required to certify abatement using a simple one page form letter or equivalent. This simple form describing the completed abatement actions will meet the requirements for

most violations. The employer certification that abatement is complete must include, among other things, a statement that affected employees and their representatives have been informed of the abatement (1903.19(c)(3)). In cases involving the most serious violations, additional documentation will be required.

Willful and repeat violations will require certification and documentation of abatement. Serious violations will require abatement documentation only if designated by VOSH. OSHA estimates that between 84 to 90 percent of all violations will require only a simple letter verification of abatement.

Abatement plans may be required by VOSH if the period allowed for abatement exceeds 90 days. Such plans, when required, will generally be simple one page documents. Progress reports may also be required by VOSH to note the status of abatement efforts and may require only a simple sentence description of the interim action taken.

For movable equipment, such as construction equipment, that has been cited as a serious hazard, the regulation would allow employers to either post a copy of the citation on the cited equipment or attach a warning tag supplied by VOSH, or devised by the employer to the equipment to alert affected employees to the presence of the hazard.

VOSH must indicate cited items on the citation for which documentation and/or an abatement plan is required and the cited items for which certification is not required.

CHANGE IV: These amendments to the Administrative Regulation for the Virginia Occupational Safety and Health Program will replace outdated references to Title 9 of the Administrative Process Act with the current references.

C. Ray Davenport
Commissioner

Attachments: CHANGES I, II and III: None. Attachments have already been incorporated into the VOSH ARM

CHANGE IV: 16 VAC 25-60-190, 290, and 320

Distribution: Commissioner of Labor and Industry
Deputy Commissioner
Directors and Managers
Compliance Staffs
Cooperative Programs Staff
Legal Support Staff
OSHA Regional Administrator, Region III
OSHA Regional Office, Norfolk

**Administrative Regulations Manual (ARM) for the Virginia
Occupational Safety and Health Program;
and Corrections**

As adopted by the
Safety and Health Codes Board

Date: April 17, 1995



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: August 1, 1995

Administrative Regulations Manual for the
Virginia Occupational Safety and Health Program

VR 425-02-95

**Amendment to the Administrative Regulation for the Virginia Occupational Safety and Health Program
by inclusion of Abatement Verification, Final Rule, 29 CFR § 1903.19**

As adopted by the
Safety and Health Codes Board

Date: September 29, 1997



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: December 15, 1997

16 VAC 25-60-307, Abatement Verification

When the regulations as set forth in the final rule for Abatement Verification, 29 CFR §1903.19, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms

or language, shall be considered to read as below:

Federal Terms/Language:

OSHA

Occupational Safety and Health Act of 1970

29 CFR

§1903.16

§1903.19

Assistant Secretary

Agency

May 30, 1997

Occupational Safety and Health
Review Commission

“(b)(2)(ii) For a contested citation item for which the Occupational Safety and Health Review Commission (OSHRC) has issued an order affirming the violation, the later of:
(A) The date identified in the final order for abatement; or
(B) The date computed by adding the period allowed in the citation for the abatement to the final order date;
(C) The date established by a formal settlement agreement.

“(b)(4)(ii)(A) The thirtieth day after the date on which a decision or order of a commission administrative law judge has been docketed with the commission, unless a member of the commission has directed review; or...”

“(b)(4)(ii)(B) Where review has been directed, the the date on which the issues its decision or order

VOSH Equivalent:

VOSH

Virginia Occupational Safety and Health Act

VOSH Standard

§0ARM.0002.03

§0ARM.0007.00

Commissioner of Labor and Industry

Department

December 15, 1997

Virginia Circuit Court

“(b)(2)(ii) For a contested citation item the date established in a formal settlement agreement between VOSH and the employer; **or**
For a contested citation item for which a Virginia Circuit Court has issued an order affirming the violation, the later of:
(A) The date identified in the final order; or
(B) The date computed by adding the period allowed in the citation for the abatement to the final order date;
or
(C) The date established by an agreed order.

“(b)(4)(ii)(A) Date that a formal settlement agreement is signed by

VOSH; or...”

“(b)(4)(ii)(B) The thirtieth day after thirtieth day after the date on which a decision or order commission

pertinent part of a case; or...”

“(b)(4)(ii)(C) That date on which a federal appeals court issues a decision affirming the violation of OSHRC

of a circuit court judge has been disposing of all or entered;, or...”

“(b)(4)(ii)(C) The date on which the Virginia Court of Appeals issues a inin a case in which a final order decision affirming the violation in a has been stayed.” VOSH case.”

16 VAC 25-60, *et seq.*, Administrative Regulation for the Virginia Occupational Safety and Health Program

As Adopted by the
Safety and Health Codes Board

Date: December 2, 2002



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: March 1, 2003

16 VAC 25-60, *et seq.*, Administrative Regulation
for the Virginia Occupational Safety and Health Program

§ 190 General Provisions

- A. Any employer or group of employers desiring a permanent or temporary variance from a standard or regulation pertaining to occupational safety and health may file with the commissioner a written application which shall be subject to the following policies:
1. A request for a variance shall not preclude or stay a citation or bill of complaint for violation of a safety or health standard;
 2. No variances on recordkeeping requirements required by the U.S. Department of Labor shall be granted by the commissioner;
 3. An employer, or group of employers, who has applied for a variance from the U.S. Department of Labor, and whose application has been denied on its merits, shall not be granted a variance by the commissioner unless there is a showing of changed circumstances significantly affecting the basis upon which the variance was originally denied;
 4. An employer to whom the U.S. Secretary of Labor has granted a variance under OSHA provisions shall document this variance to the commissioner. In such cases, unless compelling local circumstances dictate otherwise, the variance shall be honored by the commissioner without the necessity of following the formal requirements which would otherwise be applicable. In addition, the commissioner will not withdraw a citation for violation of a standard for which the Secretary of Labor has granted a variance unless the commissioner previously received notice of and decided to honor the variance; and
 5. Incomplete applications will be returned within 30 days to the applicant with a statement indicating the reason or reasons that the application was found to be incomplete.
- B. In addition to the information specified in §§ 200.A and 210.A of this regulation, every variance application shall contain the following:
1. A statement that the applicant has informed affected employees of the application by delivering a

copy of the application to their authorized representative, if there is one, as well as having posted, in accordance with § 40 of these regulations, a summary of the application which indicates where a full copy of the application may be examined.

2. A statement indicating that the applicant has posted, with the summary of the application described above, the following notice: "Affected employees or their representatives have the right to petition the Commissioner of Labor and Industry for an opportunity to present their views, data, or arguments on the requested variance, or they may submit their comments to the commissioner in writing. Petitions for a hearing or written comments should be addressed to the Commissioner of Labor and Industry, Powers-Taylor Building, 13 South Thirteenth Street, Richmond, VA 23219. Such petitions will be accepted if they are received within 30 days from the posting of this notice or within 30 days from the date of publication of the commissioner's notice that public comments concerning this matter will be accepted, whichever is later."
3. A statement indicating whether an application for a variance from the same standard or rule has been made to any federal agency or to an agency of another state. If such an application has been made, the name and address of each agency contacted shall be included.

- C. Upon receipt of a complete application for a variance, the commissioner shall publish a notice of the request in a newspaper of statewide circulation within 30 days after receipt, advising that public comments will be accepted for 30 days and that an informal hearing may be requested in conformance with subsection D of this section. Further, the commissioner may initiate an inspection of the establishment in regard to the variance request.
- D. If within 30 days of the publication of notice the commissioner receives a request to be heard on the variance from the employer, affected employees, the employee representative, or other employer(s) affected by the same standard or regulation, the commissioner will schedule a hearing with the party or

parties wishing to be heard and the employer requesting the variance. The commissioner may also schedule a hearing upon his own motion. The hearing will be held within a reasonable time and will be conducted informally in accordance with §§ 2.2-4019 and 2.2-4021 of the *Code of Virginia* unless the commissioner finds that there is a substantial reason to proceed under the formal provisions of § 2.2-4020 of the *Code of Virginia*.

- E. If the commissioner has not been petitioned for a hearing on the variance application, a decision on the application may be made promptly after the close of the period for public comments. This decision will be based upon the information contained in the application, the report of any variance inspection made concerning the application, any other pertinent staff reports, federal OSHA comments or public records, and any written data and views submitted by employees, employee representatives, other employers, or the public.

- F. The commissioner will grant a variance request only if it is found that the employer has met by a preponderance of the evidence, the requirements of either § 200.B.4. or § 210.B.4. of these regulations.
 - 1. The commissioner shall advise the employer in writing of the decision and shall send a copy to the employee representative if applicable. If the variance is granted, a notice of the decision will be published in a newspaper of statewide circulation.
 - 2. The employer shall post a copy of the commissioner's decision in accordance with § 40 of these regulations.

- G. Any party may within 15 days of the commissioner's decision file a notice of appeal to the board. Such appeal shall be in writing, addressed to the board, and include a statement of how other affected parties have been notified of the appeal. Upon notice of a proper appeal, the commissioner shall advise the board of the appeal and arrange a date for the board to consider the appeal. The commissioner shall advise the employer and employee representative of the time and place that the board will consider the

appeal. Any party that submitted written or oral views or participated in the hearing concerning the original application for the variance shall be invited to attend the appeal hearing. If there is no employee representative, a copy of the commissioner's letter to the employer shall be posted by the employer in accordance with the requirements of § 40 of these regulations.

- H. The Board shall sustain, reverse, or modify the commissioner's decision based upon consideration of the evidence in the record upon which the commissioner's decision was made and the views and arguments presented as provided above. The burden shall be on the party filing the appeal to designate and demonstrate any error by the commissioner which would justify reversal or modification of the decision. The issues to be considered by the board shall be those issues that could be considered by a court reviewing agency action in accordance with § 2.2-4027 of the *Code of Virginia*. All parties involved shall be advised of the board's decision within 10 working days after the hearing of the appeal.

§ 290 Contest Proceedings Applicable to Political Subdivisions

- A. Where the informal conference has failed to resolve any controversies arising from the citation, and a timely notice of contest has been received regarding a citation issued to a public employer other than the Commonwealth or one of its agencies, the Commissioner of Labor and Industry shall schedule a hearing in accordance with the provisions of §§ 2.2-4019 and 2.2-4021 of the *Code of Virginia*. Upon conclusion of the hearing, the commissioner will notify all participants within five working days of the decision to affirm, modify or vacate the contested aspects of the citation or abatement order.
- B. Public employers may appeal decisions of the commissioner in the manner provided for in §§ 2.2-4025 through 2.2-4029 of the *Code of Virginia*.
- C. Public employees and their authorized representative have full rights to notification and participation in all hearings and appeals as are given private sector employees.
- D. If abatement of citations is not accomplished, the commissioner shall seek injunctive relief under

§ 320 Extension of Abatement Time

- A. Where an extension of abatement is sought concerning a final order of the commissioner or of a court, the extension can be granted as an exercise of the enforcement discretion of the commissioner. While the extension is in effect the commissioner will not seek to cite the employer for failure to abate the violation in question. The employer shall carry the burden of proof to show that an extension should be granted.
- B. The commissioner will consider a written petition for an extension of abatement time if the petition is mailed to or received by the commissioner prior to the expiration of the established abatement time.
- C. A written petition requesting an extension of abatement time shall include the following information:
 - 1. All steps taken by the employer, and the dates such actions were taken, in an effort to achieve compliance during the prescribed abatement period;
 - 2. The specific additional abatement time necessary in order to achieve compliance;
 - 3. The reasons such additional time is necessary, such as the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date;
 - 4. All available interim steps being taken to safeguard the employees against the cited hazard during the abatement period; and
 - 5. A certification that a copy of the petition has been posted and served on the authorized representative of affected employees, if there is one, in accordance with § 40 of these regulations, and a certification of the date upon which such posting and service was made.
- D. A written petition requesting an extension of abatement which is filed with the commissioner after expiration of the established abatement time will be accepted only if the petition contains an explanation satisfactory to the commissioner as to why the petition could not have been filed in a timely manner.

1. The employer is to notify the commissioner as soon as possible.
 2. Notification of the exceptional circumstances which prevents compliance within the original abatement period shall accompany a written petition which includes all information required in subsection C.
- E. The commissioner will not make a decision regarding such a petition until the expiration of 15 working days from the date the petition was posted or served.
- F. Affected employees, or their representative, may file a written objection to a petition for extension of abatement time. Such objections must be received by the commissioner within 10 working days of the date of posting of the employer's petition. Failure to object within the specified time period shall constitute a waiver of any right to object to the request.
- G. When affected employees, or their representatives object to the petition, the commissioner will attempt to resolve the issue in accordance with § 330 of these regulations. If the matter is not settled or settlement does not appear probable, the Commissioner of Labor and Industry will hear the objections in the manner set forth at subsection I below.
- H. The employer or an affected employee may seek review of an adverse decision regarding the petition for extension of abatement to the Commissioner of Labor and Industry within five working days after receipt of the commissioner's decision.

I. An employee's objection not resolved under Subsection G of this section or an employer or employee appeal under Subsection H will be heard by the Commissioner of Labor and Industry using the procedures of §§ 2.2-4019 and 2.2-4021 of the *Code of Virginia*. Burden of proof for a hearing under subsection G shall lie with the employer. Burden of proof for an appeal under subsection H shall lie with the party seeking review.

1. All parties shall be advised of the time and place of the hearing by the commissioner.
2. Within 15 working days of the hearing, all parties will be advised of the Commissioner of Labor and Industry's decision.
3. Since the issue is whether the Commissioner of Labor and Industry will exercise his enforcement discretion, no further appeal is available.